Tech Art Sdn Bhd v Konsesi Kota Permatamas Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO WA-12ANCC-91–10 OF 2020
ANAND PONNUDURAI JC
8 JANUARY 2021

Civil Procedure — Appeal — Stay of proceedings — Whether the appellant had taken an active step in the proceedings — Whether there was a binding arbitration agreement — Whether stay was mandatory — Whether there was prejudice in granting stay — Arbitration Act 2005 s 10

This was an appeal by the third party against the decision of the sessions court dated 22 September 2020 in dismissing the application (encl 15) to stay the third party proceedings pursuant to s 10 of the Arbitration Act 2005 ('the AA'). The plaintiff's claim against the respondent ('the first defendant') and the second defendant before the sessions court was for the outstanding sum of RM814,014.31 for the supply and installation of equipment, technical services and equipment to a project known as 'Cadangan Pembangunan Kampus Universiti Teknologi MARA di atas Lot 472, seluas 80 ekar di Mukim Kundor, Daerah Rembau, Negeri Sembilan Darul Khusus' ('the project'). The respondent awarded a contract to the appellant as the main contractor for the project via a letter of award dated 8 May 2013 in consideration of a contract sum of RM230m. Then, the respondent and the appellant entered into a standard Pertubuhan Akitek Malaysia ('PAM') contract on 21 July 2014. The crux and basis of the respondent's claim against the appellant in the third party proceedings was for the appellant to indemnify or for contribution if the respondent was found liable for the plaintiff's claim or for any sums to be paid to the plaintiff, costs and legal expenses incurred by the respondent in the action and third party proceedings. The learned sessions court judge ('SCJ') dismissed encl 15 on the grounds that: (a) there were issues in the dispute which involved the plaintiff who was not a party bound by the arbitration clause; (b) in the event the claim in the third party notice was only a monetary one, then such claim could be separated and be decided by arbitration; (c) the said third party notice required various issues to be decided involving the plaintiffs and the defendants such as whether it was the appellant who received benefits and whether there was unjust enrichment etc; (d) the court could dismiss the application to refer the case to arbitration if the arbitration agreement was inoperative or incapable of being performed pursuant to the AA; and (e) the appellant by filing encl 21 to disqualify the solicitors was considered as them having taken active steps in the proceedings. The issues on appeal were: (i) whether the learned SCJ was correct in holding that encl 21 amounted to the appellant having taken an active step in the proceedings; (ii)

whether the appellant should not have been made a third party in the first place by the respondent as there was in existence a binding arbitration agreement between them; (iii) whether a stay was mandatory unless the agreement was null and void, inoperative and incapable of being performed; (iv) whether the SCJ erred in holding that there were no special circumstances to grant the stay; and (v) whether there was prejudice in granting the stay as the suit between the plaintiff and the respondent and second defendant could still proceed.

Held, allowing the appeal with costs:

(1) In the present case, it was not disputed that encl 21 to disqualify the solicitors was filed after encl 15 to stay the third party proceedings. Thus, it should not had been held against the appellant as them taking a step in the proceedings. Having evaluated the appellants' conduct, it could not be concluded that the appellant had elected to abandon his right to stay the third party proceedings. The learned SCJ erred in holding that encl 21 amounted to them taking a step in the proceedings (see paras 16 & 18).

(2) The respondent and the appellant had agreed to be bound by the arbitration clause in the PAM contract ie when there was any dispute or difference of any matter of whatsoever nature arising under or in connection with the contract between the appellant and the respondent, then the dispute or differences shall be referred to arbitration proceedings. The existence of a valid and binding arbitration clause between the appellant and respondent was beyond dispute. The fact that there was a pending arbitration between them fortified this (see paras 27–28).

(3) The learned SCJ clearly failed to take into account the fact that the appellant was not applying to stay the entire proceedings but only the third party proceedings against the appellant by the respondent. This could be seen from the prayers sought in encl 15. As such, the court could not see why the proceedings between the original parties to the action couldn't continue thereafter amongst the original parties. Hence, there was no issue of prejudice or 'membuang masa pihak-pihak' (see para 30).

(4) On the submission of learned counsel for the respondent on the issue of duplicity and parallel proceedings, the court found that such contention was without merit. The claim by the plaintiff in the suit was against the two defendants and not the appellant and the learned judge did not see the duplicity of proceedings or any risk of conflicting decisions being reached in two different proceedings. The learned SCJ erred and was plainly wrong when he dismissed encl 15 and this warranted intervention of the court (see paras 31 & 37).

[Bahasa Malaysia summary

Ini adalah rayuan pihak ketiga terhadap keputusan mahkamah sesyen bertarikh 22 September 2020 dalam menolak permohonan ('lampiran 15') untuk penggantungan prosiding pihak ketiga menurut s 10 Akta Timbang Tara 2005 ('ATT'). Tuntutan plaintif terhadap responden ('defendan pertama') dan defendan kedua mahkamah sesyen adalah bagi jumlah tertunggak sebanyak RM814,014.31 bagi pembekalan dan pemasangan peralatan, perkhidmatan teknikal dan peralatan kepada projek yang dikenali sebagai 'Cadangan Pembangunan Kampus Universiti Teknologi MARA di atas Lot 472, seluas 80 ekar di Mukim Kundor, Daerah Rembau, Negeri Sembilan Darul Khusus ('projek tersebut'). Responden telah menganugerahkan kontrak kepada perayu sebagai kontraktor utama bagi projek tersebut melalui surat penganugerahan bertarikh 8 Mei 2013 sebagai balasan kepada jumlah kontrak sebanyak RM230 juta. Kemudian, responden dan perayu telah memeterai kontrak Pertubuhan Akitek Malaysia ('PAM') pada 21 Julai 2014. Inti pati dan asas tuntutan responden terhadap perayu dalam prosiding pihak ketiga adalah untuk perayu menanggung rugi atau untuk sumbangan jika responden didapati bertanggungjawab terhadap tuntutan plaintif atau untuk apa-apa jumlah yang perlu dibayar kepada plaintif, kos dan perbelanjaan undang-undang yang ditanggung oleh responden dalam tindakan dan prosiding pihak ketiga. Hakim mahkamah sesyen ('HMS') telah menolak lampiran 15 atas alasan bahawa: (a) terdapat isu-isu dalam pertikaian yang melibatkan plaintif yang bukan pihak yang terikat dengan klausa timbang tara; (b) sekiranya tuntutan dalam notis pihak ketiga hanyalah satu tindakan berbentuk wang, maka tuntutan tersebut boleh diputuskan oleh timbang tara; (c) notis pihak ketiga tersebut memerlukan pelbagai isu untuk diputuskan yang melibatkan plaintif dan defendan seperti sama ada perayu merupakan pihak yang menerima faedah dan sama ada terdapat pengkayaan tidak patut dan lain-lain; (d) mahkamah boleh menolak permohonan untuk merujuk kes itu kepada timbang tara jika perjanjian timbang tara itu tidak berkuat kuasa atau tidak dapat dilaksanakan menurut ATT; dan (e) pihak perayu dengan memfailkan lampiran 21 untuk membatalkan perlantikan peguam cara tersebut dianggap telah mengambil langkah aktif dalam prosiding itu. Isu-isu rayuan adalah: (i) sama ada HMS adalah betul dalam memutuskan bahawa lampiran 21 menunjukkan pihak perayu telah mengambil langkah aktif dalam prosiding; (ii) sama ada pihak perayu tidak sepatutnya dijadikan pihak ketiga oleh responden kerana terdapatnya perjanjian timbang tara yang terikat di antara mereka; (iii) sama ada penggantungan adalah wajib melainkan jika perjanjian itu adalah batal dan tidak sah, tidak berkuat kuasa atau tidak dapat dilaksanakan; (iv) sama ada HMS terkhilaf bahawa tiada keadaan khas untuk memberikan penangguhan tersebut; dan (v) sama ada terdapat prejudis di dalam memberikan penggantungan tersebut kerana tindakan antara plaintif dan responden dan defendan kedua masih boleh diteruskan.

Diputuskan, membenarkan rayuan dengan kos:

(1) Dalam kes ini, tidak dipertikaikan bahawa lampiran 21 untuk membatalkan perlantikan peguam tersebut difailkan selepas lampiran 15 untuk menggantung prosiding pihak ketiga. Oleh itu, ianya tidak boleh dikatakan sebagai perayu mengambil langkah dalam prosiding. Setelah menilai perlakuan perayu, perayu tidak memilih untuk mengabaikan haknya untuk kekal sebagai prosiding pihak ketiga. HMS telah terkhilaf dalam memutuskan lampiran 21 menunjukkan mereka mengambil langkah dalam prosiding (lihat perenggan 16 & 18).

(2) Responden dan perayu telah bersetuju untuk terikat dengan klausa timbang tara dalam kontrak PAM iaitu apabila terdapat apa-apa pertikaian atau perbezaan dalam apa jua bentuk yang timbul di bawah atau berkaitan dengan kontrak antara perayu dan responden, maka pertikaian atau perbezaan tersebut hendaklah dirujuk kepada prosiding timbang tara. Kewujudan klausa timbang tara yang sah dan mengikat antara perayu dan responden adalah di luar pertikaian. Hakikat bahawa terdapat timbang tara yang belum selesai di antara mereka memperkuatkan lagi fakta ini (lihat perenggan 27–28).

(3) HMS terkhilaf dalam mengambil kira bahawa perayu tidak memohon untuk mengantung keseluruhan prosiding tetapi hanya prosiding pihak ketiga terhadap perayu oleh responden. Ini dapat dilihat dari prayer dalam lampiran 15. Oleh itu, mahkamah ini mendapati bahawa tiada sebab mengapa prosiding antara pihak-pihak asal dalam tindakan tidak dapat diteruskan selepas itu di antara mereka. Oleh itu, tidak timbul isu prejudis atau membuang masa pihak-pihak (lihat perenggan 30).

(4) Hujahan peguam cara responden mengenai isu pertindihan prosiding selari adalah tidak bermerit merit. Tuntutan oleh plaintif dalam saman tersebut adalah terhadap kedua-dua defendan dan bukan perayu dan hakim terpelajar tidak melihat pertindihan prosiding atau apa-apa risiko keputusan bercanggah dicapai dalam dua prosiding yang berbeza. HMS terpelajar telah melakukan kesilapan dan jelas salah apabila beliau menolak lampiran 15 dan perkara ini membenarkan campur tangan rayuan mahkamah ini (lihat perenggan 31 & 37).]

Cases referred to

Jaya Sudhir a/l Jayaram v Nautical Supreme Sdn Bhd & Ors [2019] 5 MLJ 1; [2019] 7 CLJ 395, FC (distd)

Kejuruteraan Sinar Selaseh Sdn Bhd v Global Built Sdn Bhd [2020] 11 MLJ 442, HC (refd)

Press Metal Sarawak Sdn Bhd v Etiqa Takaful Bhd [2016] 5 MLJ 417; [2016] 9 CLJ 1, FC (refd)

Protasco Bhd v Tey Por Yee and another appeal [2018] MLJU 993; [2018] 5 CLJ 299, CA (refd)

Sanwell Corp v Trans Resources Corp Sdn Bhd & Anor [2002] 2 MLJ 625; [2002] 3 CLJ 213, FC (refd)
Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd [1994] 2 MLJ 97; [1994] 2 CLJ 716, SC (refd)
Yeo Eng Lam v Infinity Vantage Sdn Bhd [2020] 4 MLJ 835; [2020] MLRAU 128; [2020] 6 CLJ 616, CA (refd)

Legislation referred to

Arbitration Act 2005 s 10

K Selvaratnam (Shankar Gunaratnam and Lau Yie Jie with him) (Rose Hussin) for the appellant.
Jasvinjit Singh (Au & Jasvinjit) for the respondent.

Anand Ponnudurai JC:

[1] The appellant was added as a third party by the respondent in the sessions court and was appealing against the decision of the learned session's court judge ('SCJ') dated 22 September 2020 dismissing their application in encl 15 to stay such third party proceedings pursuant to s 10 of the Arbitration Act 2005 ('s 10 of the AA 2005').

[2] The appellant had filed the appeal record ('AR') as well as a *rekod rayuan tambahan* containing the *alasan penghakiman* of the learned SCJ. Parties were also directed to file their respective written submissions which they duly complied with.

[3] Upon hearing submissions of learned counsel on 7 December 2020 and upon perusing the documents as well as considering all matters, I allowed the appellant's appeal. I now provide the detailed grounds for my decision.

BACKGROUND FACTS

[4] The plaintiff's claim against the respondent ('first defendant') and the second defendant before the sessions court is for the outstanding sum of RM814,014.31 for the supply and installation of equipment, technical services and equipment to a project which is known as 'Cadangan Pembangunan Kampus Universiti Teknologi MARA di atas Lot 472, seluas 80 ekar di Mukim Kundor, Daerah Rembau, Negeri Sembilan Darul Khusus' ('the project').

[5] The crux and basis of the respondent's claim against the appellant in the third party proceedings is for the appellant to indemnify or for contribution if

the respondent is found liable on the plaintiff's claim or for any sums to be paid to the plaintiff, costs and legal expenses incurred by the respondent in the action and third party proceedings.

[6] As background, the respondent awarded a contract to the appellant as the main contractor for the project via a letter of award dated 8 May 2013 (refer to pp 2–11 of the record of appeal (Part C)) in consideration of a contract sum of RM230m. Then, the respondent and the appellant entered into a standard Pertubuhan Akitek Malaysia ('PAM') contract (without quantities) 2006 on 21 July 2014 (refer to pp 13–71 of the record of appeal (Part C)).

[7] Clause 34.5 of the PAM contract between the respondent had an arbitration clause which provides as follows:

> *34.5 In the event that any dispute or difference arises between the Employer and Contractor either during the progress or after completion or abandonment of the Works regarding*:
>
> *34.5(a) any matter of whatsoever nature arising under or in connection with the Contract*;
>
> 34.5(b) any matter left by the Contract to the direction of the Architect;
>
> 34.5(c) the withholding by the Architect of any certificate to which the Contractor may claim to be entitled to;
>
> 34.5(d) the right and liabilities of the parties under Clause 25.0, 26.0, 31.0 or 32.0; or
>
> 34.5(e) the unreasonable withholding of consent or agreement by the Employer or Contractor,
>
> *Then such disputes or differences shall be referred to arbitration*.
>
> (Page 62 of the record of appeal (Part C))

[8] The respondent then took out third party proceedings against the appellant whereafter the appellant filed its application through encl 15 to stay such third party proceedings pending arbitration.

[9] However, the respondent opposed the appellant's application for a stay of the third party proceeding via their affidavit in reply, inter alia, on the grounds that:

(a) there were issues and questions of law involved and/or detrimental to the rights and liabilities of the plaintiff, respondent, second defendant and appellant;

(b) the arbitration clause in cl 34.5 of the PAM contract only involved the respondent and the appellant and which the arbitration has no jurisdiction to decide the issues between the parties; and

(c) the third party notice does not fall within any of the categories stated in cl 34.5 of the PAM contract.

[10] The appellant subsequently filed an application through encl 21 to disqualify the respondent's solicitors from acting for the respondent.

[11] It is not disputed that there currently is an ongoing arbitration between the appellant and respondent.

[12] There is also no dispute that the said arbitration clause only binds the appellant and the respondent herein and not the plaintiff or the second defendant in the court below.

THE DECISION OF THE SCJ

[13] A perusal of the *alasan penghakiman* of the learned SCJ will reveal that he first sets out the facts and nature of the claim before him, as well as the defences. He then proceeds to deal with encl 15 and the arguments put forth and thereafter dismisses encl 15 on the following findings/grounds:

(a) that there were issues in the dispute which involved the plaintiff who was not a party bound by the arbitration clause;

(b) in the event the claim in the third party notice was only a monetary one, then such claim could be separated and be decided by arbitration;

(c) the said third party notice required various issues to be decided involving the plaintiffs and the defendants such as whether it was the appellant who received benefits and whether there was unjust enrichment etc;

(d) he then makes the following finding at para (f) of the judgment as follows:

> Oleh itu, menurut s 10, Akta Timbangtara 2005, ini menjadikan prosiding ini sebagai inoperative kerana menunggu prosiding dijalankan secara timbang tara dan membuang masa pihak-pihak. Ini selaras dengan peruntukan di bawah s 10 Akta Timbangtara 2005 yang mana mahkamah boleh menolak permohonan untuk rujuk ke timbang tara sekiranya penggantungan prosiding sekiranya perjanjian timbang tara itu adalah 'inoperative' atau 'incapable of being performed'.

(e) apart from the above ground, the learned SCJ dismisses encl 15 on another ground ie that the appellant by filing encl 21 to disqualify the solicitors was considered as them having taken active steps in the proceedings.

A CONTENTIONS OF COUNSEL AND ANALYSIS

[14] At the outset, it is apt that I set out s 10 of the AA 2005 which was the basis of the appellant's application in encl 15. Section 10 of the AA 2005 provides as follows:

B

> (1) A court before which proceedings are brought in respect of a matter which is the subject of an arbitration agreement shall, where a party makes an application before taking any other steps in the proceedings, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

C

[15] I will deal first with the easier issue relating to whether or not the learned SCJ was correct in holding that encl 21 amounted to the appellant having taken an active step in the proceedings. The parties did not make any reference to this issue in their main written submissions but the appellant did, through their reply. The appellant contends that a reading of s 10 of the AA 2005 and relying on cases such as *Yeo Eng Lam v Infinity Vantage Sdn Bhd* [2020] 4 MLJ 835; [2020] MLRAU 128; [2020] 6 CLJ 616 and *Sanwell Corp v Trans Resources Corp Sdn Bhd & Anor* [2002] 2 MLJ 625; [2002] 3 CLJ 213, the stay application has to be filed before taking any other steps in the proceedings.

D

E

[16] The above position is trite. In the present case, it is not disputed that encl 21 was filed *after* encl 15 and as such, in my view, should not have been held against the appellant as them taking a step in the proceedings.

F

[17] In my view the determination of whether a step has been taken has to be evaluated by examining the appellants conduct as to whether it had unequivocally made the election to abandon its right to stay the suit for referral to arbitration when served with the third party proceedings. It is fact sensitive depending on the circumstances of the case — see the decision of Lim Chong Fong J in the case of *Kejuruteraan Sinar Selaseh Sdn Bhd v Global Built Sdn Bhd* [2020] 11 MLJ 442 which applied the decision of the Supreme Court in the case of *Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 MLJ 97; [1994] 2 CLJ 716.

G

H

[18] Applying the above, having evaluated the appellants' conduct it cannot be concluded that the appellant had elected to abandon his right to stay the third party proceedings. I agree with the appellants contention that the learned SCJ erred in holding that encl 21 amounted to them taking a step in the proceedings. There is no doubt that encl 21 was only filed after encl 15. There is also no dispute that the appellant had not taken any steps in the proceedings prior to filing encl 15.

I

[19] In fact, learned counsel for the respondent was candid and conceded before me that the filing of encl 21 after the filing of encl 15 should not have been considered as having taken a step in the proceedings. As such, I have no hesitation in concluding that the learned SCJ had erred on that score of concluding that encl 21 amounted to a step in the proceedings to be relied upon as a ground to dismiss encl 15.

[20] However, learned counsel urged me to still dismiss the appeal on the basis that the learned SCJ was correct in dismissing encl 15 on the other grounds as highlighted above.

[21] Reverting thus to the main thrust of the appeal. It is not disputed that there is indeed an arbitration clause between the appellant and respondent. The plaintiff's claim is against the respondent as first defendant and another defendant. The appellant has no agreement with the plaintiff nor the second defendant and was only made a third party by the respondent for indemnity and contribution.

[22] Under such circumstances, the appellant contends before me as follows:

(a) they should not have been made a third party in the first place by the respondent as there is in existence a binding arbitration agreement between them;

(b) s 10 of the AA 2005 renders a stay mandatory unless it finds the agreement null and void, inoperative and incapable of being performed;

(c) the learned SCJ erred in holding that there were 'no special circumstances' to grant the stay;

(d) there was no prejudice in granting the stay as the suit between the plaintiff and the respondent and second defendant could still proceed; and

(e) that they had at all times maintained that they were ready and willing to refer their dispute to arbitration. In addition, before me, counsel for the appellant submitted that the respondent would be fully entitled to amend their current claim pending before arbitration to include a claim for indemnity or contribution should they be found to be liable to the plaintiff in this claim before the sessions court.

[23] Learned counsel for the respondent on the contrary contends that the learned SCJ was correct in not granting the stay and submitted the following:

(a) in referring to their claims made via the third party notice, whilst the respondent was indeed seeking an indemnity or contribution, the respondent had also in para 4 therein stated that the following issues

needed to be resolved not just between the plaintiff and the first defendant but also between the plaintiff, second defendant and the third party as follows:

> 4. Seterusnya, defendan pertama berkehendakkan supaya soalan-soalan atau isu-isu yang berikut patut diputuskan bukan sahaja antara plaintif dengan defendan pertama bahkan juga antara plaintif, defendan kedua dan kamu, iaitu:
>
> (a) samada mengambil kira dakwaan plaintif di dalam perenggan 23 pernyataan tuntutan, ianya adalah kamu, Tech Art Sdn Bhd dan bukan defendan pertama yang telah menerima manfaat daripada tindakan sah plaintif yang tidak diniatkan dibuat secara percuma sesungguhpun tiada pehubungan kontrak sesama kamu dengan plaintif dan penerimaan barangan tersebut oleh kamu merupakan pengkayaan tidak berpatutan kepada kemudaratan plaintif;
>
> (b) samada kamu adalah pihak yang sebenarnya bertanggungan kepada plaintif untuk menjelaskan kepada plaintif keseluruhan atau sebahagian daripada tuntutan plaintif disini (sekiranya dibenarkan) tanpa perlu proses pelaksanaan atau penggulungan dibawa terhadap defendan pertama terlebih dahulu;
>
> (c) samada s 14, 27 dan 30 Akta Jualan Barangan terpakai didalam kes semasa untuk meletakkan hak (property) dan hakmilik (title) kepada peralatan professional tersebut didalam tangan defendan pertama, yakni bahawa peralatan professional tersebut telah dihantar oleh plaintif kepada kepada defendan kedua yang seterusnya menghantarnya kepada kamu atau selainnya bahawa ianya dihantar terus oleh plaintif kepada kamu tanpa merizabkan hak atau hakmilik dalam peralatan tersebut, dimana defendan kedua dan kamu bukan merupakan pemilik barangan tersebut dalam apa jua kes dengan pengetahuan penuh plaintif bahawa kamu telah atau akan menjualkannya kepada defendan pertama.

(b) that the appellant would not be bound by any judgment of the sessions court and that the respondent would be open to a double claim; and

(c) that there were overlapping issues that concerned parties who are not involved in arbitration. Reliance was placed on several cases and in particular the decision of the Federal Court in the case of *Jaya Sudhir a/l Jayaram v Nautical Supreme Sdn Bhd & Ors* [2019] 5 MLJ 1; [2019] 7 CLJ 395 where the court had enunciated the need to avoid duplicity of proceedings as well as the risk of inconsistent findings and to avoid the causing of inconvenience to third parties.

[24] As highlighted above, I have been persuaded by the arguments put forth by the appellant for the following reasons.

[25] Firstly, as did the learned SCJ, I too would refer to the decision of *Press*

Metal Sarawak Sdn Bhd v Etiqa Takaful Bhd [2016] 5 MLJ 417; [2016] 9 CLJ 1 ('Press Metal Sarawak') and *Protasco Bhd v Tey Por Yee and another appeal* [2018] MLJU 993; [2018] 5 CLJ 299 ('Protasco Bhd') where Ramly Ali FCJ in *Press Metal Sarawak* speaking for the Federal Court held as follows:

> (12) Order 69 r 10(3) of the ROC was a procedural subsidiary legislation whilst s 10(1) of the 2005 Act was a substantive provision in an Act of Parliament. Therefore, O 69 r 10(3) of the ROC could only be interpreted in a manner consistent with the mandatory provisions of s 10(1) of the 2005 Act. In any event, O 69 r 10(1) of the ROC provided an option for the court, either to 'decide that question' or 'give direction to enable it to be decided' and 'may order the proceedings to be stayed pending its decision'. The mandatory provisions of s 10(1) of the 2005 Act must prevail. The matter ought to be stayed pending arbitration if all the necessary requirements under the section were fulfilled. (paras 109–110)
>
> ...
>
> (32) The clear effect of the present s 10(1) of the 2005 Act is to render a stay mandatory if the court finds that all the relevant requirements have been fulfilled; while under s 6 of the repealed 1952 Act, the court had a discretion whether to order a stay or otherwise.
>
> (33) What the court needs to consider in determining whether to grant a stay order under the present s 10(1) (after the 2011 Amendment) is whether there is in existence a binding arbitration agreement or clause between the parties, which agreement is not null and void, inoperative or incapable of being performed. The court is no longer required to delve into the details of the dispute or difference (see *TNB Fuel Services Sdn Bhd*). In fact, the question as to whether there is a dispute in existence or not, is no longer a requirement to be considered in granting a stay under s 10(1). It is an issue to be decided by the arbitral tribunal.
>
> ...
>
> (43) *The first issue which must be determined under s 10(1) of the 2005 Act is, whether there is in existence, a valid and binding arbitration agreement or clause between the parties relating to the subject matter of the claim in question.*
>
> ...
>
> (50) In light of all those findings, the learned judge held that 'in my view, the intention of the parties was that any disputes would be referred to arbitration as per terms and conditions of the expiring Jerneh Policies and agreement extends to the matters claim in this suit.
>
> (51) We agree with the findings of the learned judge on this issue. These are findings of fact based on the evidence adduced before the court. We find that these findings are consistent with the provisions of s 9 of the 2005 Act, particularly sub-s (5) thereof, which clearly provides that a reference in an agreement to a document containing an arbitration clause shall constitute an arbitration agreement; and the agreement is in writing and the reference is such as to make that clause part of the agreement. We find no reason to disturb them.
>
> ...
>
> (53) *The legal position on this issue is clear: that parties are bound by the terms of the*

> *arbitration agreement which they had voluntarily executed and this includes reference to another document where those terms can be found, whether they take the trouble of reading them or not. There is imputed knowledge that the terms of arbitration agreement in a document referred to in an agreement are binding as if they were written in the latter agreement itself.*
>
> ...
>
> (88) *The court should lean more towards granting a stay pending arbitration under s 10(1) of the 2005 Act even in cases where the court is in some doubt about the validity of the arbitration clause or where it is arguable whether the subject matter of the claim falls within or outside the ambit of the arbitration clause.* The recent decision of the Singapore Court of Appeal supports this proposition. In *Tjong Very Sumito*, the Singapore Court of Appeal agreed with the approach taken by the trial judge, Woo J in *Dalian Hua Liang Enterprise Group Co Ltd v Louis Dreyfus Asia Pte Ltd* [2005] 4 SLR 646, that 'if it was at least arguable that the matter is the subject of the arbitration agreement, then a stay of proceedings should be ordered.' It was also held in that case, that 'if the arbitration agreement provides for arbitration of 'disputes' or 'difference' or 'controversies', then the subject matter of the proceedings in question would fall outside the terms of the arbitration agreement if (a) there is no 'dispute', 'difference' or 'controversy' as the case may be; or (b) where the alleged 'dispute' is unrelated to the contract which contains the arbitration agreement'.

[26] The above was similarly echoed in the case of *Kejuruteraan Sinar Selaseh Sdn Bhd v Global Built Sdn Bhd* [2020] 11 MLJ 442, where it was held as follows:

> [20] It is however plain from the Federal Court case of *Press Metal Sarawak Sdn Bhd v Etiqa Takaful Bhd* that it is unnecessary of the defendant to establish that there is a dispute over the plaintiff's claim before s 10 of the Arbitration Act can be invoked unlike that pursuant to s 6 of the Arbitration Act 1952 where the case of *Elf Petroleum SE Asia Pte Ltd v Winelf Petroleum Sdn Bhd* has been premised. In other words, it is adequate of the defendant having filed the application demonstrating the existence of a valid arbitration agreement in response to the plaintiff's suit. The existence of a dispute or otherwise between the parties would have to be dealt by the arbitrator in the arbitration proceedings.

[27] The facts before me reveal the respondent and the appellant had agreed to be bound by the arbitration clause in the PAM contract ie in the event there is any dispute or difference of any matter of whatsoever nature arising under or in connection with the contract between the appellant and the respondent, then the dispute or differences shall be referred to arbitration proceedings.

[28] Further, the existence of a valid and binding arbitration clause between the appellant and respondent is beyond dispute. The fact that there is a pending arbitration between them fortifies this.

[29] As seen above, s 10 of the AA 2005 mandates a stay unless of course the

court finds that the agreement is null and void, inoperative or incapable of being performed. Was there a finding by the learned SCJ that the agreement was inoperative or incapable of being performed? With respect, this is where I am of the view that he erred in his decision. A perusal of his finding on this issue as set out hereinabove, will reveal that he makes no such finding. On the contrary, what he concludes to be inoperative are the court proceedings as they would have to await the arbitration proceedings to finish therefore wasting parties time.

[30] In my considered view, the learned SCJ clearly failed to take into account the fact that the appellant herein was not applying to stay the entire proceedings but only the third party proceedings against the appellant by the respondent. This was made amply clear from the prayers sought in encl 15. As such, I don't see why the proceedings between the original parties to the action couldn't continue thereafter amongst the original parties. Hence, there was no issue of prejudice or 'membuang masa pihak pihak'.

[31] On the submission of learned counsel of the respondent on the issue of duplicity and parallel proceedings, with respect, I find such contention without merit. The claim by the plaintiff in this suit is against the two defendants and not the appellant and I do not see the duplicity of proceedings or any risk of conflicting decisions being reached in two different proceedings.

[32] In my view, the facts in the decisions of both *Jaya Sudhir*'s case as well as *Protasco Bhd* were different and reliance on them by the respondent is misplaced.

[33] The respondent has referred to the Federal Court decision of *Jaya Sudhir.* In that case, the court had to deal with the issue of competing claims in curial and arbitral proceedings and where not all parties were before both forums. The Federal Court there opined that once there is a duplication between two proceedings, the court has to consider the intersection of two powerful considerations namely firstly the desire of courts to hold commercial parties to their bargain and secondly the desire of courts to avoid disruptions and multiplicity and to avoid parallel proceedings. In that case, the court held that the primary consideration on whether to grant the injunction to restrain the arbitration proceedings where the rights of a non party thereto were involved is — what would be the fairest approach to all parties.

[34] I would also refer to a recent decision of the Court of Appeal in the case of *Protasco.* In the *Protasco*'s case, there was a civil claim in the High Court commenced by Protasco against one PT Asu and two individuals for fraud, conspiracy and breach of fiduciary duties. The dispute between Protasco and PT Asu were governed by an arbitration clause. As such, the court there found

that PT Asu was entitled to and did obtain a stay of court proceedings between Protasco and itself pursuant to s 10 of the AA 2005. Thereafter, upon an application by the two individual respondents, the High Court also granted a stay of the court proceedings between them and Protasco pending the disposal of the arbitration proceedings between Protasco and PT Asu. The crux of the appeal turned on the law governing a stay of proceedings in relation to non-parties to an arbitration agreement. In allowing the appeal and setting aside the High Court decision to stay the proceedings, the Court of Appeal held as follows:

> (1) This court was bound by the decision of the Federal Court in *Press Metal Sarawak Sdn Bhd v Etiqa Takaful Berhad*. In that case, the apex court held that in determining the scope or precise nature of the dispute intended to be submitted to arbitration, the clause ought to be interpreted widely. The commercial purpose was of primary importance. It therefore followed that the stay of proceedings granted by this court pursuant to the application made under s 10 of the AA by PT ASU encompassed the entirety of the dispute including that part of Protasco's claim relating to a conspiracy to defraud/injure as well as the imposition of a constructive trust.Therefore, no part of Protasco's claim against PT ASU fell to be considered in the civil proceedings, which were stayed pending arbitration. In effect, this meant that the claims premised on a breach of contract as well as the conspiracy allegations and the imposition of a constructive trust all fell to be determined by way of arbitration. This was clearly the intention of the parties when they entered into the agreement and must be given full effect. (paras 60–61)
>
> ...
>
> (3) This court was empowered in the exercise of its inherent jurisdiction to determine which set of proceedings ought to proceed first (or in parallel) in order to achieve the most just result for the parties. To this end, this court further considered whether the arbitration parties would be prejudiced by a stay of the arbitration pending the resolution of the non-parties' claim ...
>
> (4) Taking all the factors into consideration, and the fact that there was no indication whatsoever that the non-parties were agreeable to be bound by any findings that might be made by the arbitral tribunal, it would be best that the arbitration be stayed vis a vis Protasco and PT ASU until the court proceedings between Protasco and Tey and Ooi were determined. Ultimately it was the interests of justice that must prevail and this option appeared to best achieve that goal. However, Protasco was bound to arbitrate after the court proceedings and could not simply opt not to undertake its contractual obligation under the agreement. (paras 92–93)

[35] If at all, the *Protasco Bhd*'s decision reinforces the position that no part of a dispute between parties to an arbitration agreement should be considered in civil proceedings. The intention of parties to submit their disputes to arbitration must be given full effect. That is similarly the situation herein.

[36] As noted earlier, in the current case, there is no issue of staying the entire proceedings between the original parties and those proceedings can proceed notwithstanding that the dispute in the third party proceedings as between the appellant and respondent be stayed pursuant to s 10 of the AA 2005.

CONCLUSION

[37] Having considered all matters and for the reasons stated above, I have concluded that the learned SCJ erred and was plainly wrong when he dismissed encl 15 and warrants intervention of this court.

[38] As such, I allowed the appellant's appeal and granted order in terms of encl 15 and further ordered the respondent to pay the appellant costs of RM4,000 (subject to 4% allocator).

Appeal allowed with costs.

Reported by Muhamad Azham Marwan